This chapter will explore the basic legal concepts of highway law in Arizona as related to county highways and city streets. State highway law is not discussed in this chapter.

DEFINITIONS

By general definition, a "highway" is a free public roadway open to every person to use for travel. Highways generally refer to roads that connect cities and towns. Highways can be a route of travel on the land, on the water or in the air. The main characteristic is that the public has a right to use the roadway for travel while the appropriate jurisdiction has the duty to maintain the roadway. Highways include areas beyond "the traveled way". Any feature such as slopes, culverts, ditches, bridges and abutments all are required for the proper use of the highway and as such are considered part of the highway.

"Right-of-way" in its simpliest meaning is 'the right one party has to pass over the land of another'. Right-of-way can be in fee or only an easement.

The important thing to remember is that a right of way can be in fee or it can be only an easement. Most of the highway right of ways in Arizona have been acquired in fee, but it is highly recommended that any instrument conveying a right of way be closely examined to see the extent of the rights transfered.

The 4th 1927 session laws of Arizona, Highway Code, defined the following:

(h) "County highway" shall mean any public road constructed and maintained by any county in the state, in accordance with the provisions of law. (underlines added for emphasis).

(i) "Highway" shall mean any way or place, of whatever nature, open to the use of the public as a matter of right for the purpose of vehicular travel. The term shall be understood to embrace culverts, slucies, drains, ditches, waterways, embankments, retaining walls, trees, shrubs and fences along or upon the same, and within the right of way.

(l) "Right of way" shall mean the privilege of the immediate use of the highway.

Part of the current(1988) statutes define the following:

A.R.S. 28-101. Definitions.

9. "County highway" means any public road constructed and maintained by a county.
38. "Right-of-way" when used within the context of the regulation of the movement of traffic on a highway means the privilege of the immediate use of the highway. Right-of-way when used within the context of the real property upon which transportation facilities and appurtenances thereto are constructed or maintained means the lands or interest in lands within the right-of-way boundaries.
50. "Street" or "highway" means the entire width between the boundary lines of every way when any part thereof is open to the use of the public for purposes of vehicular travel.

The phrase "public highway" is often used. As evidenced by the definitions above, a "highway" is for "public" use. It would seem redundant to say public highway when highway would suffice. This has been addressed by the Arizona courts as follows:

"While the word "highway" is a generic term for all kinds of public ways and the phrase "public highway" is a tautological expression since all highways are public....." , State v. Cardon, 112 Ariz. 548, 544 P.2d. 657.

Clearly we see that for puposes of discussing highway law, whether "public highway" or "highway" is stated, the meaning is the same.

CREATION OF HIGHWAYS

In most states, highways can be created by statutory means such as by platting, county supervisors' action, deeds, etc. In Arizona there are specific statutes which define the process by which highways can be created. These statutes will be shown and discussed later in this chapter. At common law in most states highways can be created by prescription or usage. Usually usage by the general public and maintenance by a public authority for the statutory time period for adverse possession or acquiescence (or as another time period stated for highways) will be sufficient to create a highway. This is not necessarily so in Arizona. It is not absolutely clear as to all of the circumstances that a prescriptive highway can be created in Arizona. The courts have established that (prior to A.R.S. 28-1861, B., to be discussed later in this chapter) there can be no highways established by user in Arizona. The cases state that the only means of creating a highway is by strict compliance with the statutes, and it was not until A.R.S. 28-1861, infra, that there was a statute that addressed user highways. It is important to develop an understanding how highway law has

operated throughout Arizona's history, before discussion of A.R.S. 28-1861. Next, are several cases addressing compliance with statutes and user highways. Pay close attention to the dates of the cases:

".... in Arizona "public highways" are limited to those established in the manner provided by law and to no others." State v. Cardon, supra, (1976).

".... for in Arizona public highways can only be established in a manner provided by statute, and are not through user or prescription." Champie v. Castle Hot Springs Co., 27 Ariz. 463, 233 Pac. 1107, (1925).

"Public highways are such only as come within the express provisions of the statutes declaring them to be such....In contemplation of law, therefore, though perhaps commonly known and spoken of indiscriminately as public and as private roads, many, if not a majority, of the roads and ways running throughout all parts of the territory, and frequently in general public use, are neither public highways nor private ways, but are simply roads established without authority for the convenience of individuals, and without a legal status either as public highways or private ways." Territory v. Richardson, 8 Ariz. 336, (1904), 76 Pac. 456.

"We have no statute in this territory which recognizes that a public road or highway may be established by adverse user or by prescription." Tucson Consolidated Copper Co. v. Reese, 12 Ariz. 226, 100 Pac. 777, (1909).

"In order for there to be a public highway, the right-of-way for which is granted by the federal act, the highway must be established in strict compliance with the provisions of Arizona law." County of Cochise v. Pioneer National Title Insurance Company, 115 Ariz. 381, 565 P.2d. 887, (1977).

With the above cited cases showing Arizona courts' stated opinion that the statutes must be followed in order to create a highway, the statutes therefore must be studied and understood. As with any legal situation, it must be analyzed with understanding of the statutes in effect at the time the event took place. In dealing with highway law, the statutes in effect at the time a particular highway was created are to be considered and controlling the legal existence of the highway, the width, the location, etc. It is therefore very important to understand the statutes throughout Arizona's history to be able to deal with highways which were created at various points in time.

AUTHORITY OF CITIES AND TOWNS

Throughout the history of our statutes, authority has been given to cities and towns to create and regulate streets. With regards to the powers given to cities and towns, it is hereby noted that the 1901 statutes are essentially the same as carried forward from 1866. With minor wording changes since 1901, the following statute has given the specific power of a city to create and regulate streets as shown below in its current (1988) form:

A.R.S. 9-276. Additional powers of cities.

"A. In addition to the powers already vested in cities by their respective charters and by general law, cities and their governing bodies may:
1. Lay out and establish, regulate the use, open, vacate, alter, widen, extend, grade, pave, plant trees or otherwise improve streets, alleys, avenues, sidewalks, parks and public grounds."

It is pointed out that the term "streets" is used rather than "highway". In Arizona, as well as in general, a city street usually is viewed the same as a public highway, as evidenced by the following:

"...that the regulations of the Highway Code were intended to apply to city streets is not only manifest from the title of the act as originally passed...." Clayton v. State,38 Ariz.135,297 Pac.1037.

"A street is a species of public highway, and the term implies, among other things that the public has a right to use it for public travel thereon." Graff v. City of Casper, 281 P.2d. 685.

In addition to the city having been given the authority to control streets, etc., the city council has been given certain power by statute.

Title 11, chapter 9, 545.(section 1), of the Arizona Revised Statutes, 1901, the general council of a city or town has the power "to have and exercise exclusive control over the streets, alleys, avenues and sidewalks of the town; to give names to the same, and change the names thereof;.... to widen, extend, straighten, regulate, grade, clean or otherwise improve the same; to open, lay out and improve new streets, avenues and alleys; to vacate any street, avenue, alley or sidewalk in such town and to abolish the same....". (underlines added for emphasis).

The current statute in effect is A.R.S., 9-240. General powers of common council.
B.3.(a) To exercise exclusive control over the streets, alleys, avenues and sidewalks of the town and to give and change the names thereof.
(c) To widen, extend, straighten, regulate, grade, clean or otherwise improve the same.
(d) To open, lay out and improve new streets, avenues and alleys.
(e) To vacate or abandon any street, avenue, alley, park, public place or sidewalk in such town or to abolish them, provided, that rights-of-way or easements of existing sewer, gas, water or similar pipelines and appurtenances and for canals, laterals or ditches and appurtenances, and for electric, telephone, and similar lines and appurtenances shall continue as they existed prior to the vacating, abandonment, or abolishment thereof. (underlines added for emphasis).

It is apparent that with respect to streets, avenues and alleys, the statute has changed only in the rewrite of the paragraph (e) which discusses vacating rights-of-way.

AUTHORIY OF COUNTY-METHOD OF ESTABLISHMENT

Similar statutory authority has been given to the counties via the board of supervisors. The statute as it currently exists is A.R.S. 11-251, has changed only in artistic wording since 1901. It reads as follows:

"The board of supervisors, under such limitations and restrictions as are prescribed by law, may:
4. Lay out, maintain, control and manage public roads, ferries and bridges within the county and levy such tax therefor as may be authorized by law." (underlines added for emphasis).

With the authority to lay out and open a street or highway clearly vested in the board of supervisors of a county, "under such limitations and restrictions as are prescribed by law", it is necessary to understand the highway statutes which define how a highway can be created. The highway laws from 1866 to the current (1988) Arizona Revised Statutes are shown next. These are the statutes which the board of supervisors must follow according to their authority being given to them "under such limitations and restrictions as are prescribed by law".

1866

CHAPTER LXXI.*

Concerning Roads and Highways.

SECTION 1. All roads shall be considered as public highways which are now used as such, and have been declared such by an act of the legislative assembly of this Territory, or by an order of a board of county commissioners, or board of supervisors of any county within this Territory, or which may be hereafter declared by the boards of supervisors within their respective counties; *provided*, that this act be so construed as not to affect in any manner or apply to the "Act to incorporate the Mohave and Prescott Toll-road Company, approved November 3, 1864;" and, *provided, further*, that this act shall not apply to the counties of Pima and Mohave.

SEC. 9. The board of supervisors of each county, on presentation of petition praying for a county road to be laid out in the county, or praying for a cartroad to be laid out from the dwelling or plantation of any person through the lands of another to any public road, or from one public road to another, and designating the points therein, shall cause notice to be given to the parties owning the land over which such road is to be located, and if objections by one or more of the owners shall be made, the board of supervisors shall consider and determine the same at their next regular meeting, and if they shall be of the opinion that such road is necessary, they shall appoint three persons as viewers to view and locate said road, and, upon the return of a certificate of the viewers, shall declare the same to be a public highway; when absolutely necessary, the county surveyor, if there be any, may be called in by the supervisors to assist in said location.

1901 (same as 1877)

TITLE LXIII.

ROADS.

CHAPTER I.

GENERAL PROVISIONS.

3956. (Sec. 3601.) All roads and highways in the territory of Arizona which have been located as public highways by order of the board of supervisors, and all roads in public use which have been recorded as public highways, or which may be recorded by authority of the board of supervisors, from and after the passage of this title, are hereby declared public highways; and all roads in the territory of Arizona now in public use, which do not come within the foregoing provisions of this section, are hereby declared vacated: *Provided*, No toll road shall be established on any road vacated by virtue of the foregoing provisions of this section, upon which there shall have been expended any money or labor belonging to the road fund or tax of the several counties, unless with the full knowledge and consent of the board of supervisors of said counties.

1901 (continued)

3972. (Sec. 3617.) The board of supervisors, on presentation of a petition, signed by ten or more persons, residents of the county, and paying road taxes therein, praying for a public road to be laid out or changed within the county, or a petition signed by one or more persons, praying for a private road or lane to be laid out from the ranch or dwelling of any person to the public road, and designating the location of the road to be established as prayed for, shall cause notice to be given by posting notices, for at least twenty days, in three of the most public places in the district or township where the road is situated, describing the proposed location or change, and stating the time when they will act upon the subject of the petition; and, if they consider a road necessary, they shall appoint three viewers, the county surveyor to act as one, who shall view out and locate said road and appraise all legitimate damages arising from such location or change, and, upon the return of the certificate of the viewers, together with the location, if satisfied with the same, they shall cause the location to be recorded in the county recorder's office, and declare the same to be a public highway, and cause a notice of their action to be served upon the road overseer of the district in which said road is located. They shall also order the payment for damages allowed to be paid out of any money not otherwise appropriated, in the county treasury, belonging to the district or township in which the road is located: *Provided*, That all damages and expenses accruing from the location of any private road or lane shall be paid by the party or parties petitioning for said road; and the board of supervisors may, before acting upon any petition for such private road or lane, require such a bond from the party or parties so petitioning, as shall in their judgment seem proper, to be held as security for all damages or expense accruing from the location of said road, liabilities upon said bonds, to be collected as is provided by law in similar cases. The viewers shall receive for their services two dollars per day for each and every day actually employed, and twenty cents per mile necessarily traveled in going to and returning from the place where the contemplated road is situated, to be paid by the party or parties praying for such road, if the same shall not be granted; but, if granted, then the fees of the viewers shall become a charge upon the road fund of the district or township in which the road prayed for is situated, except in cases of private roads, in which cases all costs and expenses accruing shall be paid as hereinbefore specified.

1913

TITLE L.

ROADS.

(Chapter 74, Laws 1913,—3rd Special Session.)

CHAPTER I.

GENERAL PROVISIONS.

5055. All roads and highways in the State of Arizona which have been located as public highways by order of any of the boards of supervisors of the several counties, and all roads in public use which have been recorded as public highways, or which may be recorded by authority of any board of supervisors, are hereby declared public highways.

Until the first day of January, 1915, the present county superintendents of roads, or their successors shall continue to perform the duties now provided by law and shall have charge of all public roads and highways. After said date such duties shall be performed by the county engineer, or other county official having such work in charge.

Ter. v. Richardson, 8 Ariz. 336—76 Pac. 456.

5057. (a) All public roads in this state shall hereafter be established, changed, altered or discontinued upon petition to the county board of supervisors in which said road may be situated. Previous to the presentation of a petition for any of the above purposes, four weeks' notice thereof must be given by being posted at the county court house door and in three public places in the vicinity of the said road or proposed road. Such notice must state the beginning and terminus of said road, its general course or direction, as nearly as possible, and the time at which application will be made to the board of supervisors for the establishment of said road. If it is proposed to alter, change, or discontinue a road, the notice shall also state the purpose intended and changes or alterations proposed, and shall describe the road to be changed, altered or discontinued.

(b) When any petition shall be presented for any of the purposes above named it shall be accompanied by a copy of the notice above provided for and proof by affidavit, or other satisfactory proof, that the said notice was posted at the time and in the manner above pro-

vided. The petition shall be signed by ten or more persons, residents of the county and paying taxes therein, and shall ask for the establishment, change, alteration or discontinuance of the road as specified in the accompanying notice.

(c) Upon the presentation of such petition and proof of posting notice the said board of supervisors shall appoint three viewers, one of whom shall be the county surveyor, who shall view out and locate said road, as it is to be newly established or altered, and appraise and report all damage that may be caused by said location or change in said road.

(d) If the petition seeks the abandonment of a road the said viewers shall examine the same and report to the board of supervisors.

(e) Upon the filing of the report of the viewers the board of supervisors must appoint a day for acting upon the petition, which day must not be less than thirty or more than sixty days from the date of filing the report. The board shall also cause a notice of said hearing to be posted in the same manner as is provided for posting the notice of application, which notice shall require all persons having claims for damages as a result of the proposed establishment, change or abandonment of said road to file with said board their written claim on or before the day set for hearing the petition. The notice shall also require all persons desiring to oppose the same to file with the said board a signed statement of their reasons for so opposing.

(f) Upon the appointed day the said board shall consider the petition and the opposition thereto and all claims for damages, and may hear evidence on all of said matters; after the hearing of the petition, the said board shall cause the county surveyor to make a survey of any road that may be established or altered, and upon the filing of a plat of the survey in the office of the county recorder, the road as established or altered shall become and be a public highway. The said board shall also determine and fix claims for damages, and any person dissatisfied with their award may appeal therefrom to the superior court of the county in the manner prescribed for appeals from justices' courts. All damages shall be paid out of money not otherwise appropriated in the county treasury. The viewers provided for herein shall receive for their services two dollars per day for each and every day actually employed, and twenty cents per mile actually traveled in going to and returning from the place where their work is to be done, to be paid by the petitioners, if the petition be not granted, but if granted to become a charge upon the road fund of the county.

(g) A petition may be filed before said board signed by one or more persons, praying for the establishing or change of a road or lane from a ranch or dwelling to a public road. In such a case the procedure shall be the same as above outlined for public roads, except that petitioners must pay all damages and costs incident to the establishment or change, and must furnish a bond to be approved by the board as security for such payment.

Ter. vs. Richardson, 8 Ariz. 336—76 Pac. 456.

Tucson, etc., Co. v. Reese, 12 Ariz. 226—100 Pac. 777.

1928

Article 11. County highways and county highway commissions.

§ 1701. Procedure for altering, establishing or abandoning highways by local authorities. The boards of supervisors may establish, alter or abandon highways for counties and other legal subdivisions, and condemn and appropriate public or private property therefor. Such highways may be established, altered or abandoned by the presentation of a petition signed by ten or more resident taxpayers of the county, to the board of supervisors, or upon petition to such board by the governing body of a legal subdivision, praying that a highway be established, altered or abandoned, and giving the beginning, terminus and the general course and direction thereof. The board may either reject said petition, or act thereon as hereinafter prescribed.

Upon the filing of the petition the board shall direct the county engineer to make a survey of the proposed highway and file with the board a report of the proposed highway together with a map as surveyed, and showing thereon the legal subdivision of the lands traversed by the survey. If a survey and maps have been made, such data and maps may be used instead.

The board shall thereupon set a date for a public hearing on said petition and for the appointment of a board of appraisers to assess the amount of compensation and damages each land owner or party affected is entitled to, and shall also give notice to each such person by service as in a civil action, and notice to the public by advertising once a week for two consecutive weeks in a newspaper in such county. Said notice shall state the purpose and the date of the ensuing hearing, and shall direct all persons wishing to object to the action prayed for in the petition to file with the board a statement in writing setting forth any objection or opposition, and to show cause why said petition should not be granted.

At the hearing the board shall consider the feasibility, advantages and necessity of the highway sought to be established, and, if in the opinion of the board the proposed highway is a public necessity, the board may approve the establishment thereof by resolution, and may accept any right of way or property donated to the state or the county. Thereupon the board shall appoint a board of appraisers, none of whom shall have any right, title or interest in the land or property sought to be condemned and appropriated, to appraise, assess and determine the fair and equitable amount of compensation, and the amount of damages, if any, each land owner or party affected is entitled to; and said board of appraisers shall file with the board a written report containing the appraisements of each parcel of land not granted or donated, the amount of damages to each land owner and party affected by the proposed highway, together with general particulars of its findings. Any party may make written waiver or release of all compensation or any part thereof; or may make a grant of easement or other conveyance of property for such purposes.

The board shall then appoint a day for the final hearing not less than thirty days from the date of the appraisers' report, and at said hearing consider the petition and all opposition, objections, demands or claims for compensation, and may hear evidence, and either reject or order the granting of said petition and the establishment, alteration or abandonment of the highway as requested. All evidence taken at the hearing shall be reduced to writing and shall become a part of the record. The judgment of the board shall be adopted by resolution and so recorded in the minutes of said board together with the order condemning and appropriating to public use all lands, estate, interest or thing described as prayed for in said petition, or any part thereof, and shall award to each claimant compensation for property taken and payment for damages. When the board shall have filed in the office of the county recorder of the county wherein the said highway is located, a record of its judgment together with a map of the highway, said highway shall thereafter be established, altered or abandoned.

Any claimant to an award of compensation or damages made by the said board may appeal to the superior court of the county by serving a written notice of appeal upon the said board within five days after the rendition of its judgment, and within ten days from the date of the judgment file with the said board a bond in double the amount of the probable costs, to be approved by said board conditioned that the appellant will prosecute his appeal to effect and will pay all costs which shall accrue in said court. The board shall then make a copy of all orders made in the proceeding, and certify thereto and transmit the same together with all the original papers in the proceedings and the evidence to the clerk of the superior court within ten days after the filing of the bond on appeal, and the said cause shall thereupon stand for trial in the superior court on the record, and such further evidence as may be received by the court. (§ 3972, R. S. '01; 5057, R. S. '13, am., Ch. 87, L. '17, rev.)

1939

59-601. Procedure for altering, establishing, or abandoning highways by local authorities.—The boards of supervisors may establish, alter or abandon highways for counties and other legal subdivisions, and condemn and appropriate public or private property therefor. Such highways may be established, altered or abandoned by the presentation of a petition signed by ten [10] or more resident taxpayers of the county, to the board of supervisors, or upon petition to such board by the governing body of a legal subdivision, praying that a highway be established, altered or abandoned, and giving the beginning, terminus and the general course and direction thereof. The board may either reject said petition, or act thereon as hereinafter prescribed.

Upon the filing of the petition the board shall direct the county engineer to make a survey of the proposed highway and file with the board a report of the proposed highway together with a map as surveyed, and showing thereon the legal subdivision of the lands traversed by the survey. If a survey and maps have been made, such data and maps may be used instead.

The board shall thereupon set a date for a public hearing on said petition and for the appointment of a board of appraisers to assess the amount of compensation and damages each land owner or party affected is entitled to, and shall also give notice to each such person by service as in a civil action, and notice to the public by advertising once a week for two [2] consecutive weeks in a newspaper in such county. Said notice shall state the purpose and the date of the ensuing hearing, and shall direct all persons wishing to object to the action prayed for in the petition to file with the board a statement in writing setting forth any objection or opposition, and to show cause why said petition should not be granted.

At the hearing the board shall consider the feasibility, advantages and necessity of the highway sought to be established, and, if in the opinion of the board the proposed highway is a public necessity, the board may approve the establishment thereof by resolution, and may accept any right of way or property donated to the state or the county. Thereupon the board shall appoint a board of appraisers, none of whom shall have any right, title or interest in the land or property sought to be condemned and appropriated, to appraise, assess and determine the fair and equitable amount of compensation, and the amount of damages, if any, each land owner or party affected is entitled to; and said board of appraisers shall file with the board a written report containing the appraisements of each parcel of land not granted or do-

1939 (continued)

nated, the amount of damages to each land owner and party affected by the proposed highway, together with general particulars of its findings. Any party may make written waiver or release of all compensation or any part thereof; or may make a grant of easement or other conveyance of property for such purposes.

The board shall then appoint a day for the final hearing not less than thirty [30] days from the date of the appraisers' report, and at said hearing consider the petition and all opposition, objections, demands or claims for compensation, and may hear evidence, and either reject or order the granting of said petition and the establishment, alteration or abandonment of the highway as requested. All evidence taken at the hearing shall be reduced to writing and shall become a part of the record. The judgment of the board shall be adopted by resolution and so recorded in the minutes of said board together with the order condemning and appropriating to public use all lands, estate, interest or thing described as prayed for in said petition, or any part thereof, and shall award to each claimant compensation for property taken and payment for damages. When the board shall have filed in the office of the county recorder of the county wherein the said highway is located, a record of its judgment together with a map of the highway, said highway shall thereafter be established, altered or abandoned.

Any claimant to an award of compensation or damages made by the said board may appeal to the superior court of the county by serving a written notice of appeal upon the said board within five [5] days after the rendition of its judgment, and within ten [10] days from the date of the judgment file with the said board a bond in double the amount of the probable costs, to be approved by said board conditioned that the appellant will prosecute his appeal to effect and will pay all costs which shall accrue in said court. The board shall then make a copy of all orders made in the proceeding, and certify thereto and transmit the same together with all the original papers in the proceedings and the evidence to the clerk of the superior court within ten [10] days after the filing of the bond on appeal, and the said cause shall thereupon stand for trial in the superior court on the record. and such further evidence as may be received by the court. [R. S. 1901, § 3972; 1913, § 5057; Laws 1917, ch. 87, p. 126; rev., R. C. 1928, § 1701.]

1961

§ 18-201. Establishing, altering or abandoning local highways

The board of supervisors may establish, alter or abandon highways in the county and other legal subdivisions, and acquire real property for such purposes by purchase, donation, dedication, condemnation or other lawful means. Such highways may be established or altered by presentation of a petition signed by ten or more resident taxpayers of the county to the board of supervisors, or upon petition to the board by the governing body of a legal subdivision, praying that a highway be established or altered and giving its beginning, terminus and its general course and direction. The board may either reject the petition or act thereon as prescribed by this article. The board may abandon or vacate such highways by resolution as provided in title 18, chapter 5, article 1.

As amended Laws 1961, Ch. 105, § 2.

§ 18-202. Survey of proposed highway; notice of hearing

A. Upon filing the petition, the board shall direct the county engineer to make a survey of the proposed highway and file with the board a report of the proposed highway, together with a map as surveyed, showing thereon the legal subdivision of the lands traversed by the survey. If a survey and maps have already been made for any purpose, such data and maps may be used instead.

B. The board shall thereupon set a date for a public hearing on the petition. The board shall give notice to the public by advertising once a week for two consecutive weeks in a newspaper in the county. The notice shall state the purpose and the date of the ensuing hearing, and shall direct all persons desiring to object to the action prayed for in the petition to file with the board a statement in writing setting forth their objection or opposition, and to show cause why the petition should not be granted.

As amended Laws 1961, Ch. 105, § 3.

§ 18-203. Hearing

A. At the hearing provided for in § 18-202 the board shall consider the feasibility, advantages and necessity of the highway sought to be established, and, if in the opinion of the board the proposed highway is a public necessity, the board may approve the establishment thereof by resolution, and may accept any right of way or property donated to the state or the county.

B. A landowner or party affected may make and execute a written waiver or release of all compensation or any part thereof, or may grant an easement or other conveyance of property for such purposes.

As amended Laws 1961, Ch. 105, § 4.

1973-1974 (added A.R.S. 28-1861)
***** User Highway Statute *****

§ 28-1861. State highways and routes defined

A. The state highways, to be known as state routes, shall consist of the highways declared prior to August 12, 1927 to be state highways, under authority of law, which the transportation board, after receipt of a recommendation from the director, may add to, abandon or change. If the transportation board proceeds contrary to the recommendations of the director, it shall file a written report with the governor, stating the reasons for such action. The state highways shall consist of such parts of the state routes designated and accepted as state highways by the transportation board. No highway which has not been designated a state route shall become a state highway, nor shall any portion of a state route become a state highway until it has been specifically designated and accepted by the transportation board as a state highway, and ordered constructed and improved.

B. All highways, roads or streets which have been constructed, laid out, opened, established or maintained for ten years or more by the state or any agency or legal subdivision of the state prior to January 1, 1960, and which have been used continuously by the public as thoroughfares for free travel and passage for ten years or more, regardless of any error, defect or omission in the proceeding or failure to act to establish such highways, roads or streets, or in recording of the proceedings, and all such highways, roads or streets are declared public highways.

Added Laws 1973, Ch. 146, § 69, eff. July 1, 1974. As amended Laws 1974, Ch. 183, § 2.

§ 18-201. Establishing, altering or abandoning local highways

The board of supervisors may establish, alter or abandon highways in the county and other legal subdivisions, and acquire real property for such purposes by purchase, donation, dedication, condemnation or other lawful means. Such highways may be established or altered by presentation of a petition signed by ten or more resident taxpayers of the county to the board of supervisors, or upon petition to the board by the governing body of a legal subdivision, praying that a highway be established or altered and giving its beginning, terminus and its general course and direction. The board may either reject the petition or act thereon as prescribed by this article. The board may abandon or vacate such highways by resolution as provided in title 28, chapter 14, article 1.[1]

Amended by Laws 1976, Ch. 162, § 23.

A.R.S. 18-202 & 18-203 remain unchanged.

The statutes listed above apply to county roads, which are frequently encountered. Roads originally established by these statutes in the county that may now be within a city or town, are still controlled by these statutes since the road was in county jurisdiction at the time it was created. Note some wording change in 1928 and then the addition to the basic procedure in 1961. The 1961 legislature added other ways to acquire real property for rights-of-way such as by "purchase, donation, dedication, condemnation or other lawful means." It is not absolutely clear whether prior to 1961 the county could simply go out and negotiate for new rights-of-way as suggested in the 1961 statute, without a petition . The 1928 statutes clearly show condemnation as a means, but does not specifically state the other separate methods such as in the 1961 statutes. Perhaps the court interpretation of this is as follows:

"Section 1701, supra, which it is contended by defendants is the only method under which supervisors may establish or alter highways for counties and condemn and appropiate public or private property therefor, is quite lengthy. It may be summarized as follows:

A petition must first be presented to the board of supervisors by ten or more resident taxpayers....." County of Apache, appellant, v. Udall, appellee, 38 Ariz. 488, 1 P.2d. 340 (1931). (underlines added for emphasis). Udall was the defendant and prevailed. We clearly see that the court cited the 1928 statute, section 1701, and certainly states that a "petition must first be presented."

There is no question that counties have actually opened many roads throughout the territory and did not follow the petition method, or all of the other provisions of the statutes, in every case. There are probally many illegally opened roads throughout Arizona. The fact that they are opened and used do not make them public highways. However, A.R.S. 28-1861, clearly sets forth a statutory provision for creating a user highway for certain roads. There are some limitations with respect to A.R.S. 28-1861, paragraph B. First, it only applies to roads or streets that

were established, laid out, constructed, or maintained by a city, county or the state agency AND used by the public for free travel or ten years or more, PRIOR TO Jan. 1,1960. This statute does not appear to address roads opened after and used after Jan.1, 1950. In other words, for roads opened and used after Jan. 1, 1950, there is no statute for creating that highway by user. Therefore, strict compliance of the statutes is required. Also, this statute will not apply to roads that may have error or defects in the establishment proceedings that were not used by the public for ten or more years, prior to Jan. 1, 1960. Why did not the legislature provide for user highways after 1960!?

It is emphasized that these statutes, whatever their application and interpretation may be, provide for the only method(s) (except for by platting) for establishing highways by the county as evidenced by the following:

"The proceedings by the board of supervisors to establish the highway were taken under section 1701, Revised Code of 1928, which prescribes the exclusive method for a county to obtain a right of way for a county highway. Grossetta v. Choate, 51 Ariz. 248, 75 P.2d. 1031. (underlines added for emphasis).

"By paragraph 3972 it is provided that the board of supervisors may lay out or change a public road on the petition of ten or more resident taxpayers within the county. No other provision is found in our statutes for the establishment of public roads than is found in this paragraph" Tucson Consolidated Copper Co. v. Reese, supra.

METHOD OF ESTABLISHMENT IN CITIES AND TOWNS

The statutes shown on pages 201 thru 209 do not apply to incorporated city streets since their respective general councils have always been empowered by statute with "exclusive control" over opening and laying out of streets as shown by previously discussed statutes and as evidenced by the following:

"General laws of the state concerning the securing of right of way for public roads do not extend to or effect the powers conferred on cities and towns to lay out and improve their streets." Collins v. Wayland, 59 Ariz. 340, 127 P.2d. 716. (underlines added for emphasis).

TITLE TO STREETS

Typically cities and towns have recieved street rights-of-ways by legal means such as by plat dedications, purchases, donations, condemnations, etc. Platting of land within a city or town has always passed fee title of the streets and alleys to the city or town as shown by the following existing statute:

"A.R.S. 9-254. Title to streets.
Upon filing a map or plat, the fee of the streets, alleys, avenues, highways, parks and other parcels of ground reserved therein to the use of the public vests in the town, in trust, for the uses therein expressed. If the town is not incorporated, then the fee vests in the county until the town becomes incorporated."

This statute has been in existence in this basic form since 1901. The 1887 statutes say basically the same thing. That is "title to the streets will vest with the public forever". These statutes do also apply to subdivisions within the unincorporated areas of the county.

DEDICATION/ACCEPTANCE

There is one important item to consider, not mentioned in statutes but, clearly addressed by the courts, and that is there must be an acceptance of the dedicated streets in platted subdivisions for title to pass. This is evidenced by the following cases:

"In order to have a dedication, there must not only be an intent to dedicate, and an acceptance, but there must also be a dedication to a public use." City of Scottsdale v. Mocho (1968), 8 Ariz. App. 146, 444 P.2d. 437. (underlines added for emphasis).

"While title to streets dedicated to public as part of subdivision in unincorporated area is in the county, unless there has been an acceptance of the streets they are not public highways." State v. Cardon, supra. (underlines added for emphasis).

"In this jurisdiction, it is well settled that the making and recording in the county recorder's office of a plat showing lots, blocks, dimensions thereof and width of all streets coupled with the sale of lots therein, constitutes a dedication of such streets, and use thereof by purchasers of lots and the general public constitutes sufficient acceptance of the dedication, by which fee in the dedicated property passes to the county in trust for the uses therein described." Moeur v. City of Tempe (1966), 3 Ariz. App. 196, 412 P.2d. 878. (underlines added for emphasis).

These cases on acceptance would apply to certain highway dedications such as: streets and highways dedicated per plat, that were never approved by a governing body. This may also include some older subdivisions or land splits that do not fall under the jurisdiction of a city or county. Also included would be streets or highways that are dedicated by deed or common law (see chapter on Common Law Dedications), but were never resolved by a governing body to be "accepted". Current platting procedures usually include a step that has the governing body

sign in acceptance of the plat. Always watch for deeds and plats (or records of surveys) that split land and dedicate roads. Some of these type of roads may not be "public highways" unless there has been acceptance by a writing (or resolution) or by some physical act of maintenance by the governing body.

This next statute discusses acceptance of county streets and roads as applied to the maintenance system, and is not to be confused with the acceptance of the fee title to the roads.

A.R.S. 11-806.01. Subdivision regulation; platting rules; violation; classification; easement vesting
I. Approval of a plat shall not be deemed to constitute or effect an acceptance by the county for designation of any street, highway, bicycle facility or other way or open space shown upon the plat into the county maintenance system except for hiking and equestrian trails which shall be constructed and maintained by the county. However, at such time as the streets, highways, bicycle facilities or other ways are fully completed in accordance with the approved plat and written specifications made by the county board, the county shall accept such streets, highways, bicycle facilities and other ways into the county maintenance system within one year of completion. (underlines added for emphasis).

Summary of stautes and cases shown so far

So far it has been shown that:

1. Platting can create streets, highways, alleys, etc. within the limits of an incorporated city or town.

2. Platting can create streets, highways, alleys, etc. within the unincorporated areas of a county.

3. Legal methods such as purchases, donations, etc. can establish streets within the limits of an incorporated city or town.

4. Highways could be established as outlined in statutes, in the unincorporated areas of a county prior to 1961 (by petition and road map, etc) and still can be established by that method; after 1961 was added to the statutes, the methods to acquire highways by purchase, donation, etc.

5. A.R.S. 28-1861, B., established a statute whereby certain roads established, laid out, contsructed or maintained...and used by the public for free travel for ten or more years, prior to Jan. 1,1960, are declared to be public highways. This statute only applies to roads used for ten or more years prior to Jan. 1, 1960.

6. Platting alone does not constitute an acceptance of the streets. Acceptance must be physical (maintenance or use) or in the form of approval by a governing body (plat signature, etc.).

JURISDICTIONAL AUTHORITY

A concept of law that should be understood is what is called "jurisdictional authority". As it relates to governmental bodies it has to do with the authority vested with that government body to legally do something. State statutes generally give power to cities and counties to make certain decisions and declarations. We have seen that the county board of supervisors have been given power to layout and open highways, subject to the laws of the state. Prior to 1961 the statutory provisions for opening a highway were by petition, viewing, survey, resolution, etc. Many western states have similar procedures for establishing county roads and most have addressed this issue of "jurisdictional authority". As it applies to county supervisors and the opening of a county road, the courts have stated that if all of the conditions of the controlling statute(s) pertaining to the opening of the road were not complied with, subsequent declaration of the road as a public highway is not legal. The board of supervisors do not have "jurisdiction" to declare the road open. This principle has been established as evidenced by the following cases:

From a continuation of Tucson Consolidated Copper Co. v. Reese, supra, the court further stated:

"It does not appear that the resolution was made on such petition...."...it appears that the only action which was taken by the board of supervisors in relation thereto was to declare it the official map of Pima County. It was not recorded or filed for record in the office of the county recorder. It did not therefore come within the statute, and hence did not operate to make the road in question a public highway. Before giving the resolution of the board its effect, it must appear that the board of supervisors had jurisdiction to declare it such at that time." (underlines added for emphasis). *This case occured prior to the curative statute, to be discussed, infra.

"It appears that the statutory procedure for laying out and establishing the highway was fully complied with...". Calhoun v. Moore, 69 Ariz. 402, 214 P.2d. 799.

"The record also affirmatively shows that the day fixed for the meeting of the viewers was less than 10 days subsequent to the day of such appointment, and therefore the notice required to be given neither was given, nor could have been given; therefore we think there is not only a failure to show jurisdiction, but an affirmative showing in some respects that the board failed to

acquire jurisdiction either of the subject-matter or of the persons." Goerke v. Town of Manitou, 139 P. 1049.(Colorado).

Notice in the case of Calhoun v. Moore that the court was not addressing the fact that the board did not comply with statutes in any way, but the court clearly recognized the fact that the statutes were indeed complied with as a basis for their decision.

The case of Goerke v. Town of Manitou is a Colorado case, yet it clearly states another court's viewpoint on the matter of "jurisdictional authority".

As Arizona grew so did the need for more highways. It became increasingly difficult in the state's early years to continually meet every aspect of the statutes. The boards' of supervisors began to fall prey to roads opened without jurisdictional authority. Court cases began cropping up contesting the existence and location of highways.

CURATIVE STATUTE

The curative statute was enacted during the 1927 4th session laws of Arizona. It was intended to remedy situations where a highway was laid out in error. The statute as it was originally adopted on August 12, 1927 is shown as follows:

"All highways heretofore constructed, laid out, opened or established as public highways by the territory or state, or by any board of supervisors or legal subdivision of the state, and which have been used continuously by the public as thoroughfares for free travel and passage for two years, or more, regardless of any error, defect or omission in the proceeding to establish such highways, or in the recording of such proceedings, and all highways which shall be hereafter established pursuant to law, are hereby declared to be public highways sixty-six feet wide, unless the width thereof is otherwise specified; provided, that no portion of a public highway within the limits of an incorporated city or town having a population of more than twenty-five hundred shall come under the provisions of this chapter except as specifically provided for herein."

This curative statute remained essentially the same until 1973. The current curative statute (1988) is as follows:

§ 28-1862. Width of highways; errors in establishing

A. All highways constructed, laid out, opened or established prior to August 12, 1927 as public highways by the territory or state, or by a board of supervisors or legal subdivision of the state, and which have been used continuously by the public as thoroughfares for free travel and passage for two years or more, regardless of any error, defect or omission in the proceeding to establish the highways, or in recording of the proceedings, and all highways established pursuant to law, are declared public highways sixty-six feet wide, unless the width thereof is otherwise specified.

B. No portion of a public highway within the limits of an incorporated city or town having a population of more than twenty-five hundred shall come under the provisions of this section except as specifically provided for in this title.

Added Laws 1973, Ch. 146, § 69, eff. July 1, 1974.

It certainly appears that the curative statute could fix alot of defects and errors in highways established prior to August 12, 1927. This statute has been tested in Arizona courts and certain limitations do apply. The following cases address this statute:

"It appears that the statutory procedure for laying out and establishing this public highway was fully complied with, save and except that the center line of the roadway as actually laid out on the ground, used by the public and maintained by the county since that time, is not really upon the quarter section line.....In other words the map required by law to be prepared by the county engineer and filed with the county recorder was not a true reflection of the physical facts as they then existed or as they now exist, for there is not now and never has been a roadway laid out and established on the quarter section line....a survey was made by the county engineer which definitely established that a surveying error had been made in laying out the roadway...plaintiffs (appellees) filed an action in the superior court to have determined by declatory judgement the true centerline and width of the roadway in question....The court entered judgement in favor of the plaintiffs, declaring that the 50-foot roadway actually laid out on the ground, used by the public and maintained by the county since 1915, was a duly established county highway....As we interpret section 59-401.... any error resulting from the defect in laying out, establishing, opening or constructing this roadway along a line different from that called for on the plat as filed, was remidied by this curative statute, the operative effect of which was to give legal existence to the roadway as laid out, opened and used." Calhoun v. Moore, supra. (underlines added for emphasis).

Calhoun v. Moore established that a county road simply laid out with a surveying (location) error did not invalidate the right-of-way. The highway existed as actually laid out.

This next case of city of Tucson, appellant v. Morgan, appellee, 13 Ariz. App. 193, 475 P.2d. 285, involved a situation whereby the City of Tucson brought suit to quiet title of a roadway that was laid out by the county before the area was annexed into the city. The facts of the case showed that the board of supervisors offered no reimbursement for damages to the adjoining landowners. The court viewed this as taking land without just compensation. The proper steps according to the statutes were not followed except that a resolution and map were recorded. The case is as follows:

"On September 9, 1926 the Pima County Board of Supervisors, pursuant to 5057 of the Revised Statutes for Arizona, 1913 Civil Code, passed a resolution purportedly condeming the land in question. Pursuant to the resolution, viewers were appointed. The viewers reported to the Board that the benefits of the new roadway to the landowners would exceed any compensation due to

them and no compensation was paid to the landowners. On October 2, 1926 Road Map No.109 was recorded in the office of the Pima County Recorder.....Appellant argues that the McCune case and the case of Pima County v. Cappony, 83 Ariz. 348, 321 P.2d. 1015 (1958) stand for the proposition that the resolution of the Board of Supervisors and the filing of the road map "establishes" the highway.....This view is erroneous for two reasons. First, the law is now and was in 1926 that title does not rest in the county until a final order of condemation is made and a copy thereof filed with the county recorder....Futhermore, to read McCune and Cappony in manner advocated by the appellant is to violate Article 2, Section 17, of the Arizona Constitution which provides in part:
"***No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner***."
The situation here is analogous to that in the case of City of Tucson v. Melnykovich, 10 Ariz. App. 145, 457 P.2d. 307 (1969) wherein we held that the mere passing of a resolution in the filing of a map does not constitute a taking....."

The city then went on to cite the curative statute claiming it would apply to correct this defect, and the court in City of Tucson v. Morgan further stated:

"We believe that the effect of this statute is no greater than the filing of a resolution and recording of a map or plat. To interpret this statute as giving title to the land in question would be to violate the constitutional provisions for the taking and damaging of private property for the same reasons as set forth in the McCune case." (underlines added for emphasis).

The exact situations where the curative statute can be applied will certainly vary from case to case. Now it is worded such that it can only be applied to roads that were supposedly established as public highways prior to August 12, 1927. It appears that roads established after August 12, 1927 would again fall under the exact provisions of law with no remedy for defects in the creation of the highway. In other words, the Board of Supervisors must have had jurisdictional authority. The only remedy for improperly created highways for those roads after August 12, 1927, is of course A.R.S. 28-1861, B., provided that the road(s) have been used for the required ten year period prior to Jan. 1, 1960. The curative statute will not operate to create a public highway where there were errors in the proceedings and the road was not used for the ten year period as set forth in A.R.S. 28-1861, B. This is evidenced by the case of City of Tucson v. Morgan, where the public had not used the claimed portion of roadway for ten years, and the case of County of Cochise v. Pioneer National Title Insurance Company, supra, where again the county had not opened the roadway long enough for there

to be public use for ten years. In these two instances A.R.S. 28-1861, B., could not be applied and the only possible remedy was the curative statute. In the case of County of Cochise v. Pioneer National Title Insurance Company, the court stated:

"The court concluded that the attempted establishment of the road was defective under the then applicable law, Paragraph 3972 of the Civil Code of 1901, and that a subsequent curative statute could not divest appellees and their predecessors in interest of the property. We agree."

The curative statute will operate to create the "legal existence" of a highway if laid out in error prior to August 12,1927.

In City of Tucson v. Morgan it is clear that the county board of supervisors did not operate fully within the law, since there was no compensation for damages by the board of supervisors. Also in City of Tucson v. Morgan we see that there was a resolution and a map filed, but these actions alone did not operate to establish the legal existence of the highway.

Now reread the statement by the court in City of Tucson v. Morgan that the effect of the curative statute "is no greater than the filing of a resolution and recording of a map or plat". If you think about it, at the time the board made the resolution is the time they must have had jurisdictional authority. The recording of the map or plat used in making the decision to open the road and then the recordation of the resolution would have to come after the board met. So at the time a road may have been declared open, if the board had jurisdiction and then only erred in the subsequent reording of the resolution and the map, then the statement made in City of Tucson <u>might</u> remedy this error. (Remember this could only apply to roads established before 1927). Applying this interpretation it would be possible to have some county roads opened legally that do not have a resolution or map/plat recorded. Also, the limitations that seem apparent are that the curative statute may not operate to establish jurisdictional authority where there otherwise was none. It may only serve to correct errors beyond what is minimally required to establish such authority. This statute will not operate to deny just compensation as with improper condemnation proceedings and most likely will not operate to remedy a fraud or misrepresentation.

THE SURVEYOR'S ROLE

How does all of this affect the role of the surveyor?

Surveyor's are not judicial officers:

"A surveyor is not a judicial officer. It is not within his province to make a determination as to whether land is within or without the operation of certain laws....while the reference to the plat of this surveyor undoubtedly has bearing upon the legal boundaries of the tract of land conveyed, this plat cannot determine the legality of the right-of-way here in dispute." State v. Crawford, 13 Ariz. App. 225, 475 P.2d. 515.

It is not encouraged that a surveyor makes a decision as to the "legal existence" of a roadway. But from the cases shown we clearly see that in some cases the roadway is legally where it is, and as a surveyor the "as-built" location is our business. Also, the surveyor as a finder of facts is the one most likely to run across duly recorded resolutions, maps, plats, etc. or be most likely to find that these things do not exist. Take a look in the supervisors' records to see if a petition was made, etc. You do not need to make a decision, but can perhaps better serve your client by investigating these things that as a general rule are not searched for by any other professions in the course of a boundary survey.

Always measure the width of the road in actual use and look for original monuments, and locate the centerline of the roadway as it actually exists. With respect to user highways, keep in mind that the centerline of the right-of-way is not necessarily the center of the paved surface. The center of the right-of-way is considered the center of the width of use, such as from toe of slope to top of slope, or fence to fence. Anyplace that it is clear the county has occupied and maintained up to. Keep in mind that in a city there is often a parkway area within the right-of-way which is to be maintained by the adjoining landowner.

VACATIONS AND REVERSIONS

As previously discussed, the powers conferred upon cities and towns and the board of supervisors, not only include certain statutory authority to create and open highways, but within operation of the same statutes they have the powers to vacate public highways and streets, subject to the laws of the state.

In addition to vacation by resolution of the city council or board of supervisors, streets and highways can be vacated by platting. If the vacation is by platting then redistribution of the fee title to the previously platted streets is shown by the new plat.

If the vacation is by resolution, the resolution may define who gets the fee title to the streets. Prior to July 1, 1974 if the resolution failed to state who would recieve the title to the streets, then standard reversionary principles would apply. A good reference for discussion on these principles can be found in Boundary Control and Legal Principles, Brown, 3rd. edition. After July 1, 1974 state statute controls the reversion as shown by A.R.S. 28-1902, on the next page:

28-1902. Disposition of unnecessary public roadways; application to other public uses; sale to abutting owners; vacation with title vesting in abutting owner; vacation with title vesting in owners association; definition

A. When in the discretion of the governing body of a city, town, OR county or the state, a public roadway owned by the city, town, county or ~~the~~ state respectively, or a portion of such roadway is no longer necessary for public use as a roadway, the governing body may dispose of or use the same as follows:

1. A roadway or portion thereof may be exchanged with an abutting owner for all or part of a new public roadway and, when so exchanged, title shall vest in such grantee.

2. The governing body or, in the case of the state, the board may authorize the director to sell and, by quitclaim deed, convey the land within such roadway or portion thereof, and thereupon such roadway or portion thereof shall be deemed to be vacated and title thereto shall vest in the grantee, provided that if such grantee is an abutting owner title shall vest subject to the same encumbrances, liens, limitations, restrictions and estates as exist on the grantee's abutting land. No less than sixty days prior to the date of sale, a notice of sale describing the roadway or portion thereof to be sold, making specific reference to this section, and stating that any person may submit purchase offers and that abutting owners shall have preference rights in accordance with the provisions of this section shall be posted at intervals of no more than one mile and in no less than three places on or along the side of such roadway and shall be delivered or mailed to abutting owners of record when their addresses are known or can be readily discovered. Abutting owners of record in whom title to a portion of such roadway would vest under paragraph 3 of this section may at the sale, or at any time prior to the sale, deliver to the clerk or secretary of the governing body or, in the case of the state, the director a written offer to purchase such portion or a part of such portion for the consideration paid for the same by the city, town, county or the state, whichever first acquired the land within the roadway for public use. If such an offer is timely submitted it shall be preferred over all other offers. In the absence of such an offer the governing body or, in the case of the state, the director may sell the roadway or portion ~~thereof~~ OF THE ROADWAY for such consideration as it shall deem advisable.

3. If the roadway is a city or county roadway, the governing body may resolve that such roadway or portion thereof be vacated, and thereupon title to such roadway or portion thereof shall vest, subject to the same

encumbrances, liens, limitations, restrictions and estates as exist on the land to which it accrues, as follows:

(a) In the event that a roadway which constitutes the exterior boundary of a subdivision or other tract of land is vacated, title to the roadway shall vest in the owners of the land abutting the vacated roadway to the same extent that the land included within the roadway, at the time the roadway was acquired for public use, was a part of the subdivided land or was a part of the adjacent land.

(b) In the event that less than the entire width of the roadway is vacated, title to the vacated portion shall vest in the owners of the land abutting such vacated portion.

(c) In the event that a roadway bounded by straight lines is vacated, title to the vacated roadway shall vest in the owners of the abutting land, each abutting owner taking to the center of the roadway, except as provided in subdivisions (a) and (b) of this paragraph. In the event that the boundary lines of abutting lands do not intersect such roadway at a right angle, the land included within such roadway shall vest as provided in subdivision (d) of this paragraph.

(d) In all instances not specifically provided for, title to the vacated roadway shall vest in the owners of the abutting land, each abutting owner taking that portion of the vacated roadway to which his land, or any part thereof, is nearest in proximity.

(e) No portion of a roadway upon vacation shall accrue to an abutting roadway.

4. Notwithstanding paragraph 3 OF THIS SECTION, if the roadway is a city or county roadway in a planned development, the governing body may resolve that the roadway or portion thereof be vacated and that title to such vacated roadway or portion vests in the owners association if the following conditions are met:

(a) The owners association includes the owners of the land abutting the roadway or portion thereof to be vacated.

(b) The owners association has rights and remedies under covenants, conditions or restrictions of title to maintain the vacated roadway and to assess all members of the association for the maintenance of the roadway.

(c) Two-thirds of the members of the owners association and a majority of the owners of commercial property abutting the roadway or portion thereof to be vacated approve the vesting of title to such roadway or portion in the association.

5. If the roadway is a state roadway, the governing body may resolve that the state's interest in such roadway or portion thereof be abandoned and thereupon the state's interest in so much of the roadway as lies without the boundaries of incorporated cities shall vest in the county wherein it lies and the state's interest in so much of the roadway as lies within the boundaries of an incorporated city shall vest in such city. The director shall promptly notify the city or county affected thereby and such county or city may maintain such roadway as other county or city roadways are maintained or may dispose of it as provided in this section or section 28-1907.

B. FOR THE PURPOSES OF THIS SECTION, "ABUTTING OWNER" MEANS THE ORIGINAL OWNER OF THE VACATED ROADWAY OR HIS HEIRS WHO HAVE PREVIOUSLY HAD A PORTION OF THE PROPERTY ACQUIRED FOR ROADWAY PURPOSES AND THEREAFTER HAVE BEEN LEFT WITH AN ABUTTING REMAINDER OF PROPERTY OVER WHICH THEY STILL RETAIN DIRECT OWNERSHIP.

Approved by the Governor, April 20, 1989.

Filed in the Office of the Secretary of State, April 21, 1989.

After study of the following statute it is clear that the reversion principles are very similar to the generic ones found at common law. It is highly recommended that whenever dealing with a vacated street the resolution proclaiming it abandoned should be examined and referenced on the plat of survey.

Finally, the following statutes are also applicable in vacating of streets as they deal with easement reservations and hearing:

§ 28-1903. Reservation of easements

Rights of way or easements of existing sewer, gas, water or similar pipelines and appurtenances and for canals, laterals or ditches and appurtenances, and for electric, telephone, and similar lines and appurtenances shall continue as they existed prior to the disposal or abandonment thereof.

Added Laws 1973, Ch. 146, § 69, eff. July 1, 1974.

§ 28-1904. Notice; hearing; appraisal

The governing body or, in the case of the state, the board may give notice of pending disposition of roadways, hold hearings, obtain appraisals and take other similar action in connection with such disposition when it deems such action necessary or advisable.

Added Laws 1973, Ch. 146, § 69, eff. July 1, 1974. As amended Laws 1974, Ch. 141, § 23.

(8 Ariz. 338)

TERRITORY v. RICHARDSON et al.

(Supreme Court of Arizona. March 26, 1904.)

MALICIOUS INJURY TO PRIVATE ROAD—INDICTMENT—SUFFICIENCY — PUBLIC HIGHWAYS—PRIVATE ROADS—WHAT CONSTITUTES.

1. Rev. St. 1901, par. 3956, declares that all roads located as public highways by the supervisors, or roads in public use which have been recorded as public highways, shall be public highways, and all roads not coming within the foregoing provisions are vacated. Section 3972 authorizes the board of supervisors to lay out public or private roads in the manner therein prescribed. *Held*, that public highways are such only as come within the statutory provisions, and private roads are such as are duly laid out by the public authorities, and roads merely established without authority for the convenience of individuals are neither public nor private roads.

2. Pen. Code, § 524, making it punishable to maliciously injure any public highway or "private way laid out by authority of law," does not make it a criminal offense to commit an injury to a private way not laid out by authority of law.

3. An indictment under Pen. Code, § 524, for maliciously injuring a private way, which alleges that defendant injured a private way "laid out by authority of law," is fatally defective, for failing to aver the facts showing that the way was laid out by authority of law; the allegation quoted being descriptive, merely.

Appeal from District Court, Santa Cruz County; before Justice Davis.

R. R. Richardson and another were indicted for maliciously injuring a private way. From a judgment sustaining a demurrer to the indictment, the territory appeals. Affirmed.

Wells, Atty. Gen., and Smith & Ives, for the Territory. Hereford & Hazard, for appellees.

KENT, C. J.—Section 524 of the Penal Code of Arizona reads as follows: "Every person who maliciously digs up, removes, displaces, breaks or otherwise injures or destroys any public highway or bridge, or any private way laid out by authority of law, or bridge upon such highway or private way, is punishable by imprisonment in the territorial prison not exceeding five years, or in the county jail not exceeding six months." Under this section an indictment was found against the defendants in the following terms: "R. R. Richardson and James Johnson are accused by the grand jury of the county of Santa Cruz, territory of Arizona, by this indictment, found on the 22d day of December, A. D. 1903, of the crime of digging up a private way laid out by authority of law, committed as follows, to wit: The said R. R. Richardson and James Johnson on or about the 17th day of September, A. D. 1903, and before the finding of this indictment, at the county of Santa Cruz, territory of Arizona, did unlawfully, willfully, feloniously, and maliciously dig up a private way laid out by authority of law, to wit, the private way in said Santa Cruz County, territory of Arizona, leading from the county road between Harshaw and Washington Camp to the Trench Mine, by digging a shaft across the center of said private way, said shaft being about six feet long, four feet wide, and five feet deep, at a point about one hundred and fifty feet from the said county road leading from Harshaw to Washington Camp, contrary," etc. A demurrer was interposed to this indictment on the ground that the indictment did not charge a public offense or any offense against the defendants; that the indictment failed to charge that the way was a private way, or what private way was intended, or to whom the same belonged, or whether the digging was without the consent of the owner of the way, or whether the way was laid out by authority of the law of Arizona or elsewhere; and that the indictment was not direct and certain as to the offense, or as to the circumstances of the offense. The demurrer was sustained by the court, and the territory has brought this appeal.

We find in the Revised Statutes the following provisions pertinent to the question raised on this appeal:—

"Par. 3956. All roads and highways in the territory of Arizona which have been located as public highways by order of the board of supervisors, and all roads in public use which have been recorded as public highways, or which may be recorded by authority of the board of supervisors, from and after the passage of this title, are hereby declared public highways; and all roads in the territory of Arizona now in public use, which do not come within the foregoing provisions of this section, are hereby declared vacated. . . .

"Par. 3972. The board of supervisors, on presentation of a petition, signed by ten or more persons, residents of the county, and paying road taxes therein, praying for a public road to be laid out or changed within the county, or a petition signed by one or more persons, praying for a private road or lane to be laid out from the ranch or dwelling of any person to the public road, and designating the location of the road to be established as prayed for, shall cause notice . . . ; provided, that all damages and expenses accruing from the location of any private road or lane shall be paid by the party or parties petitioning for said road; and the board of supervisors may, before acting upon any petition for such private road or lane, require such a bond from the party or parties so petitioning, as shall in their judgment seem proper, to be held as security for all damages or expense accruing from the location of said road, liabilities upon said bonds to be collected as is provided by law in similar cases. . . .

"Par. 614. Every city . . . shall have the power to lay out . . . maintain and improve streets," etc.

"Par. 3990. In all of the towns in the territory not incorporated, and containing a population of more than five hundred souls, the streets shall be considered as public highways, and under the control of the board of supervisors of the county in which such towns may be situated.

"Par. 3998. Any person or persons desiring to construct and maintain a toll road within one or more counties of this territory, shall make, sign and acknowledge, before some officer entitled to take acknowledgment of deeds, a certificate specifying, first, the name by which the road shall be known, and, second, the names of the places which shall constitute the termini of said road. Such certificate shall be accompanied," etc.

We find no reference to private ways or private roads in the statute, other than as contained in the sections hereinbefore referred to. In the common acceptation of the term, roads or ways are considered to be either public or private; but in the legal acceptation a way may be a road that is neither a public highway nor a private road or way, under our statutes. Public highways are such only as come within the express provisions of the statutes declaring them to be such. The statutes do not define a private road or way. At common law a private way is the right of passage over or under another person's ground, which belongs to and is for the use of individuals—one or more—as distinct from a way that is used by the public in general, and such a way is an easement. 1 Am. &

Eng. Ency. of Law, 2d ed., p. 3. Such a private way may be acquired by grant, reservation, prescription, or under a statute authorizing its establishment. In contemplation of law, therefore, though perhaps commonly known and spoken of indiscriminately as public and as private roads, many, if not a majority, of the roads and ways running throughout all parts of the territory, and frequently in general public use, are neither public highways nor private ways, but are simply roads established without authority for the convenience of individuals, and without a legal *status* either as public highways or private ways. Such roads, where they may have heretofore existed as public highways, and where no right has vested, have by the legislature been declared vacated. This action of the legislature, however, does not create them private ways. The legislature has made it clear that it was not its intention to make it a criminal offense to commit an injury to any such class of roads, even if they might be considered as private ways. Our Penal Code in the section under discussion has expressly limited such injury to injury to public highways, and to private ways laid out by authority of law. Even if such roads might be considered therefore to be private ways, nevertheless they are not included in this statute, for they are not ways laid out by authority of law, such as would be, for example, ways laid out as provided in paragraph 3972 of the statutes. They are, on the contrary, in most instances, ways laid out and maintained without authority of law.

The indictment in the case before us is defective, in that it not only fails to contain any allegations respecting the facts surrounding the establishment and existence of the private way upon which the injury is alleged to have been committed, from which it can be inferred even that such way was laid out by authority of law; but the indictment fails to allege in direct terms that such way was a way laid out by authority of law. While the indictment does contain the allegation that the defendants did maliciously "dig up a private way laid out by authority of law, to wit," etc., such an allegation is descriptive, merely, and, as set forth, it is not a direct allegation that such way was a way laid out by authority of law. The act of maliciously digging up a private way is not necessarily a criminal offense under our statutes. It becomes one only when such way is a way laid out by authority of law. Therefore an indictment which fails to allege facts showing that such way was so laid out, and which does not even contain the direct allegation that such way was a way so laid out, is defective and cannot be sustained.

Our conclusion in this respect makes it unnecessary to consider the other objections urged.

The judgment of the court below is affirmed.

Sloan, J., and Doan, J., concur.

214 P.2d 799

CALHOUN et al. v. MOORE et al.

No. 5197.

Supreme Court of Arizona.

Feb. 9, 1950.

Action by George D. Moore and others against Owen L. Calhoun and others for declaratory judgment.

From a judgment of the Superior Court, Maricopa County, Dudley W. Windes, J., determining that certain roadway in use was a duly established highway, Owen L. Calhoun and another appealed.

The Supreme Court, Udall, J., held that any error resulting from defect in laying out, establishing, opening or constructing roadway along a line different from that called for on plat as filed, was remedied by curative statute. A.C.A.1939, § 59-401.

Judgment affirmed.

1. Highways ⇐18

Establishment of public highways is governed by statute, and roads established otherwise than is expressly provided thereby are not public highways. A.C.A.1939, § 59-601.

2. Highways ⇐23, 71, 79(1)

Authority to establish, alter, or abandon public roads is vested exclusively in Board of Supervisors. A.C.A.1939, § 59-601.

3. Adverse possession ⇐8(2)

Title to public highways cannot be acquired by private parties through adverse possession. A.C.A.1939, § 59-601.

4. Constitutional law ⇐74

Declaratory judgment that roadway in actual use was a duly established county highway though its location did not conform exactly to location shown by map prepared by county engineer and filed with county recorder did not invade exclusive province of Board of Supervisors to establish highway, but merely determined that such highway had been legally established and its location. A.C.A.1939, § 59-601.

5. Highways ⇐56

Any error resulting from defect in laying out, establishing, opening or constructing roadway along line different from that called for on plat as filed was remedied by curative statute, the operative effect of which was to give legal existence to roadway as laid out, opened and used. A.C.A. 1939, §§ 59-401, 59-601.

6. Highways ⇐71

Board of Supervisors as constituted in 1947 had no right to review proceedings by which its predecessors in 1915 had legally established a roadway, and could only change the bearing or route of such roadway by the statutory procedure for altering, establishing or abandoning a public roadway. A.C.A.1939, § 59-601.

7. Declaratory judgment ⇐218

Where error resulting from defect in laying out, establishing, opening or constructing roadway along line different from that called for on plat was remedied by curative statute, the effect of which was to give legal existence to roadway as layed out, opened and used, declaratory judgment would lie to determine where the operative effect of curative statute placed legal bearing of the roadway. A.C.A.1939, §§ 27-702, 59-401, 59-601.

8. Highways ⇐62

Where error resulting from defect in laying out, establishing, opening or constructing roadway along a line different from that called for on plat as filed was remedied by curative statute, an order of the Board of Supervisors, which failed to recognize effect of the curative statute, though no appeal was taken therefrom, was not final or conclusive nor res judicata of issues between the parties interested, and did not deprive court of jurisdiction to entertain action in which all interested parties were brought before the court for declaratory judgment. A.C.A.1939, §§ 27-702, 59-401, 59-601.

Kramer, Morrision, Roche & Perry, L. V. Rhue, of Phoenix, for appellants.

Fred V. Moore, of Phoenix, for appellees.

UDALL, Justice.

This is an appeal by defendants from a declaratory judgment determining a portion of Twenty-Third Avenue which lies outside the limits of the City of Phoenix in Maricopa County to be a duly established county highway. The roadway involved is a strip one half mile in length running practically north and south between Indian School Road, on the south, and Campbell Avenue, on the north.

In the year 1915, upon application by interested property owners the Board of Supervisors of Maricopa County, proceeding under section 5057, Revised Statutes of Arizona, 1913, Civil Code, now Sec. 59-601, A.C.A.1939, purportedly established a public roadway 50 feet in width along the north-south quarter section line of section 24, township 2 north, range 2 east of the G. & S. R. B. & M., and extending 25 feet on each side of said median line. It appears that the statutory procedure for laying out and establishing this public highway was fully complied with, save and except that the center line of the roadway

as actually laid out on the ground, used by the public and maintained by the county since that time, is not really upon the quarter section line, but is in truth and in fact 53 feet west thereof at Indian School Road and 24 feet west thereof at Campbell Avenue. In other words the map required by law to be prepared by the county engineer and filed with the county recorder was not a true reflection of the physical facts as they then existed or as they now exist, for there is not now and never has been a roadway laid out and established on the quarter section line.

It further appears from the record that since the highway was established in the year 1915, property abutting the roadway has been subdivided, tracts sold, houses and other improvements erected thereon, many of which improvements on the east encroach more or less upon the road right of way as originally platted. In fact the testimony shows that if a 50-foot highway were now established squarely upon the north and south median line of section 24, some nine houses would have to be moved as well as utility poles, fences, open ditches, hedges, and underground pipe lines.

Some time in 1946, preliminary to paving this county roadway, a survey was made by the county engineer which definitely established that a surveying error had been made in laying out the roadway. However, many of the abutting property owners had been aware of the mistake for some years. In February, 1947, plaintiffs-appellees (being all of the abutting property owners on the east) filed a petition with the Board of Supervisors seeking a declaration that the existing roadway was the true established county highway rather than the 50-foot strip, 25 feet in width on each side of the north and south median line of the section as platted upon the map of record and described upon the minutes of the Board of Supervisors. After due notice to all parties interested, objections were filed by appellants and other defendants below (property owners on the west), a hearing was had and on October 30, 1947, the Board entered an order rejecting what it termed the "petition for alteration of the 23rd Avenue highway" and directed the county engineer to proceed to improve the highway within the right of way as originally platted on the quarter section line.

Shortly thereafter plaintiffs (appellees) filed an action in the superior court to have determined by declaratory judgment the true center line and width of the roadway in question. There were named as parties defendant: Maricopa County, a body politic, its board of supervisors and county engineer, as well as all of the individual abutting property owners on the west side of said highway. The issues were framed and a trial had where testimony was taken. As highlighting the position of the plaintiffs we quote from the testimony of D. W. Fountain, who had been a resident of the area in question since

1912, and had acted as one of the viewers of said highway when it was established in 1915, wherein he stated:

"Q. And how long has that highway known as 23rd Avenue existed? A. That I do not know. I know it has been used as it now is since 1912.

"Q. Since 1912? A. That is right.

"Q. Of your own knowledge you know it has been used? A. That is right.

"Q. Was that roadway there in existence at the time you went out there and viewed it? A. It was.

"Q. And was that roadway as it existed in 1912 and as it now exists was that the roadway which you intended to designate and lay out as the highway at that time? A. It was."

The court entered judgment in favor of the plaintiffs, declaring that the 50-foot roadway actually laid out on the ground, used by the public and maintained by the county since the year 1915, was a duly established county highway. From this judgment, and the denial of their motion for a new trial, only the defendants Owen L. Calhoun and Nellie J. Calhoun, his wife, prosecute this appeal.

[1-3] Defendants assert that the trial court erred in rendering judgment in favor of plaintiffs and against appellants in that (1) the court was without jurisdiction of the subject matter; (2) the third count of plaintiffs' complaint, upon which the action was tried, does not state a claim upon which relief can be granted; (3) the order of the Board of Supervisors of October 30, 1947, is res judicata of all issues between the parties, and (4) the judgment is not supported by the evidence and is contrary to law. In support of these assignments of error the following propositions of law are urged: (a) The establishment of public highways is governed entirely by statute, and roads established otherwise than as expressly provided thereby are not public highways. (b) Authority to establish, alter, or abandon public roads is vested exclusively in the Board of Supervisors. (c) Title to public highways cannot be acquired by private parties through adverse possession. (d) The judgment of the Board of Supervisors, dismissing the petition to change the location of the highway and directing the County Engineer to proceed with the improvement thereof upon its original location, is not subject to collateral attack. (e) The action of the Board of Supervisors is not subject to review by a suit for declaratory judgment.

We agree that propositions numbered (a), (b), and (c), supra, correctly state the law. It should be noted, however, the plaintiffs here are not claiming any rights against the public by reason of adverse possession. Their claim is that by virtue of section 59-401, A.C.A.1939, enacted in 1927, the hiatus resulting from the error or mistake which the board made in laying out the roadway in question has been overcome

and legal existence given the actual roadway, thus leaving for determination only the question as to whether the curative statute, hereinafter quoted, by its operation fixed the legal bearing of the roadway involved as actually laid out on the ground. Plaintiffs contend that the statute is controlling in the situation presented by this record. It reads: "59-401. *Width of highways—Errors in establishing.*—All highways heretofore constructed, laid out, opened or established as public highways by the territory or state, or by any board of supervisors or legal subdivision of the state, and which have been used continuously by the public as thoroughfares for free travel and passage for two (2) years, or more, regardless of any error, defect or omission in the proceeding to establish such highways, or in the recording of such proceedings, and all highways which shall be hereafter established pursuant to law, are hereby declared to be public highways sixty-six (66) feet wide, unless the width thereof is otherwise specified; provided, that no portion of a public highway within the limits of an incorporated city or town having a population of more than twenty-five hundred (2,500) shall come under the provisions of this chapter except as specifically provided for." The defendants in effect allege by their answer there was no error, defect or omission in the original proceedings to establish, construct, open and lay out the highway in question and hence that the curative statute is inapplicable. We cannot agree with this view. It is clear that the road was constructed, it was opened and it was established by usage, either of which brings it within the purview of the curative statute above.

[4-6] Section 5057, supra, under which establishment of the road involved was instituted, gave the supervisors exclusive jurisdiction to determine (A) whether a necessity for a roadway existed, and (B) where the bearing of the roadway should be upon the ground. Hence, in the instant case the trial court by its declaratory judgment was not invading the exclusive province of the Board of Supervisors to establish a highway, but was merely determining whether such highway had been legally established and if so upon what line. As we interpret section 59-401, supra, any error resulting from the defect in laying out, establishing, opening or constructing this roadway along a line different from that called for on the plat as filed, was remedied by this curative statute, the operative effect of which was to give legal existence to the roadway as laid out, opened and used. Thus once the roadway became legally established the Board of Supervisors as constituted in 1947, certainly had no right to review the 1915 proceedings of its predecessors, as it could only change the bearing (route) of said road by instituting afresh and following through to conclusion the statutory procedure for altering, establishing,

or abandoning a public roadway as set out in section 59-601, A.C.A.1939. This was not done. Rather the supervisors saw fit to deny the existence of the legal roadway in use and direct its engineer to build the road along the quarter section line where it had never been legally established.

[7, 8] Section 27-702, A.C.A.1939, of the Declaratory Judgment Act, states: "Any person * * * whose rights, status or other legal relations are affected by a statute, * * * may have determined any question of construction or validity arising under the * * * statute, * * * and obtain a declaration of rights, status or other legal relations thereunder. * * *" Surely under the facts in this case the legal relations of the parties were affected by section 59-401, supra, and any persons whose legal relations or rights were affected thereby were entitled under the declaratory judgment act to have their disputed status settled by a judicial determination as to where the operative effect of said curative statute placed the legal bearing of the roadway. The supervisors by their order of October 30, 1947, failed or refused to recognize the curative statute or give to the plaintiffs any relief thereunder. While there was no appeal from this ruling the Board's action was not final or conclusive nor res judicata of the issues between the parties. A bona fide justiciable controversy remained. The court had before it all of the interested parties, including the county, its board of supervisors and county engineer, hence it had jurisdiction, under this direct attack, to entertain this declaratory judgment suit and to render the judgment which it did.

We hold that the curative statute which was obviously enacted to meet such a situation is controlling.

Judgment affirmed.

LA PRADE, C. J., and STANFORD, PHELPS and DE CONCINI, JJ., concur.

475 P.2d 285

CITY OF TUCSON, a municipal corporation, Appellant,

v.

Leonard MORGAN et ux., et al., Appellees.

No. 2 CA-CIV 748.

Court of Appeals of Arizona,

Division 2.

Oct. 14, 1970.

Rehearing Denied Nov. 13, 1970.

Review Denied Jan. 5, 1971.

Action by city to quiet title to public highway together with 80-foot-wide right-of-way. The Superior Court of Pima County, Cause No. 87098, Mary Anne Richey, J., refused to quiet title in city, and city appealed. The Court of Appeals, Howard, C. J., held that curative statute that all highways established prior to specified date and used continuously as thoroughfares for two years or more were declared to be public highways regardless of any error, defect or an omission in proceeding to establish highways did not work to vest title in city to property which had been unconstitutionally taken for highway by resolution of board of supervisors.

Affirmed.

1. Eminent Domain ⇐320

Title to public property taken by county for public use does not vest in county until a final order of condemnation is made and a copy thereof filed with county recorder. A.R.S.Const. art. 2, § 17; A.R.S. § 18-204.

2. Appeal and Error ⇐1008(1)

Court of Appeals is not bound by lower court's findings that are clearly erroneous.

3. Dedication ⇐1

"Dedication" is the intentional appropriation of land by the owner to some proper public use.

See publication Words and Phrases for other judicial constructions and definitions.

4. Limitation of Actions ⇐60(10)

Filing of road map constituted only cloud on title of property located in highway right-of-way and cause of action to quiet title for removal of cloud was a continuous one and not barred by limitations while cloud existed.

5. Appeal and Error ⇐854(2)

If a trial court bases its ruling on the wrong reasons but is correct in its ruling for any reason, the appellate court is bound to affirm.

6. Highways ⇐56

Curative statute that all highways established prior to specified date and used continuously as thoroughfares for two years or more were declared to be public highways regardless of any error, defect or an omission in proceeding to establish highways did not work to vest title in city to property which had been unconstitutionally taken for highway by resolution of board of supervisors. A.R.S. §§ 18-152, 18-204; A.R.S.Const. art. 2, § 17.

Lewis C. Murphy, City Atty., by J. Mercer Johnson, Special Counsel, Tucson, for appellant.

Spaid, Fish, Briney & Duffield, by Richard R. Fish, Tucson, for appellees Quinsler and Wood.

Dunseath & Stubbs, P. C., by Robert C. Stubbs, Tucson, for all other appellees.

HOWARD, Chief Judge.

In 1966 the City of Tucson commenced this action to quiet title to the public highway known as Alvernon Way between Broadway and Speedway together with an 80 foot wide right-of-way, 40 feet on either side of the County Section Line, naming as defendants the owners and mortgagees of various properties abutting on Alvernon Way.

On September 9, 1926 the Pima County Board of Supervisors, pursuant to § 5057 of the Revised Statutes for Arizona, 1913 Civil Code, passed a resolution purportedly condemning the land in question. Pursuant to the resolution, viewers were appointed. The viewers reported to the Board

that the benefits of the new roadway to the landowners would exceed any compensation due to them and no compensation was paid to the landowners. On October 2, 1926 Road Map No. 109 was recorded in the office of the Pima County Recorder.

Thereafter, the land on either side of the road was subdivided. Subdivision maps pertaining to the land in question were approved by the city engineer, county engineer, the Mayor and council of the City of Tucson and the Pima County Board of Supervisors and recorded in the office of the Pima County Recorder. For some unknown reason these subdivision maps and plats showed Alvernon to be 60 feet in width instead of 80 feet in width and did not show an encroachment in any way upon the lots in question. Relying on the subdivision plats, the landowners built their homes in such a manner that, if the City prevails in this case, the right-of-way line will run right through their houses.

The facts also show that prior to this action the city included the appellees' land in two improvement districts and collected from the landowners over the years approximately $60,000.00 against the property in question. From 1935 to 1962, taxes were assessed on the full subdivision lots, including the land which the City now claims that it owns.

The City also issued at least two building permits which allowed the landowners to make improvements in the land the City now claims.

The appellees, among other defenses, relied on estoppel as a defense to this action and the trial court ruled in favor of the appellees on the estoppel theory.

The City vigorously maintains that estoppel will not work against a municipal corporation. However, we do not find it necessary to decide whether the circumstances in this case create an estoppel since there are other cogent reasons for affirming the trial court.

Under the Arizona Constitution, Article 2, Section 17, A.R.S., the landowner is entitled to just compensation before his property can be taken or damaged for public use. The County in this case proceeded under § 5057 of the Revised Statutes for Arizona, 1913, Civil Code. At no time has the city or county exercised any dominion over the property in question. This procedure, whereby the Board of Supervisors condemns the property and assesses damages, was declared unconstitutional since it violated the above provision of the Constitution which states that compensation "shall be ascertained by a jury" (unless waived) as in other civil cases "in courts of record, in the manner prescribed by law." McCune v. City of Phoenix, 83 Ariz. 98, 317 P.2d 537 (1957).

[1] Appellant argues that the *McCune* case and the case of Pima County v. Cappony, 83 Ariz. 348, 321 P.2d 1015 (1958) stand for the proposition that the resolution of the Board of Supervisors and the filing of the road map "establishes" the highway and therefore passes title to the county. This view is erroneous for two reasons. First, the law is now and was in 1926 that title does not vest in the county until a final order of condemnation is made and a copy thereof filed with the county recorder. State ex rel. Morrison v. Helm, 86 Ariz. 275, 345 P.2d 202 (1959); A.R.S., Civil Code, § 3092 (1913). Furthermore, to read *McCune* and *Cappony* in the manner advocated by the appellant is to violate Article 2, Section 17, of the Arizona Constitution which provides in part:

> "* * * No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner * * *."

The situation in this case is analogous to that in the case of City of Tucson v. Melnykovich, 10 Ariz.App. 145, 457 P.2d 307 (1969) wherein we held that the mere passing of a resolution in the filing of a map does not constitute a taking and does not cause any interference with or invasion of the land or curtailment of its use. See also Weintraub v. Flood Control District of Maricopa County, 104 Ariz. 566, 456 P.2d

936 (1969); Schock v. Jacka, 105 Ariz. 131, 460 P.2d 185 (1969).

The appellant argues that this court is bound by the findings of fact made by the trial judge. In particular the appellant points to the following findings:

"1. That Alvernon Way between Speedway and Broadway was properly dedicated and established in accordance with § 5057 et seq. (1913 Civil Code) now A.R.S. § 18–204 in 1926.

* * * * * *

4. That any claim that compensation for any portion of the road as shown on road map #109 has been waived and barred by the statute of limitations."

[2, 3] We are not bound by findings that are clearly erroneous. Finding #1 is clearly erroneous in holding that there was a "dedication". "Dedication" is the intentional appropriation of land by the owner to some proper public use. City of Phoenix v. Landrum and Mills Realty Co., 71 Ariz. 382, 227 P.2d 1011 (1951). There is no evidence that the landowners dedicated an 80-foot right-of-way on Alvernon to Pima County.

[4] As to Finding #4 it is also clearly erroneous since the resolution and filing of the road map constitutes only a cloud on the title and a cause of action to quiet title for the removal of the cloud on title is a continuous one and never barred by limitations while the cloud exists. City of Tucson v. Melnykovich, supra; 54 C.J.S. Limitations of Actions § 124.

[5] Furthermore, if the trial court based its ruling upon the wrong reasons but was correct in its ruling for any reason, the appellate court is bound to affirm. Arnold v. Knettle, 10 Ariz.App. 509, 460 P.2d 45 (1969).

[6] Appellant also contends that the curative act of 1927, now A.R.S. § 18–152, establishes its title to the land in question. The pertinent portions of this statute are as follows:

"A. All highways constructed, laid out, opened or established prior to August 12, 1927 as public highways by the territory or state, or by a board of supervisors or legal subdivision of the state, and which have been used continuously by the public as thoroughfares for free travel and passage for two years or more, regardless of any error, defect or omission in the proceeding to establish the highways, or in recording of the proceedings, and all highways established pursuant to law, are declared public highways sixty-six feet wide, unless the width thereof is otherwise specified."

We believe that the effect of this statute is no greater than the filing of a resolution and recording of a map or plat. To interpret this statute as giving title to the land in question would be to violate the constitutional provisions for the taking and damaging of private property for the same reasons as set forth in the *McCune* case.

Affirmed.

HATHAWAY and KRUCKER, JJ., concur.

565 P.2d 887

COUNTY OF COCHISE, a body politic, Appellant,

v.

PIONEER NATIONAL TITLE INSURANCE COMPANY, Trustee under Trusts No. 218413 and No. 10662 and Lloyd Fuller, Appellees.

No. 2 CA-CIV 2197.

Court of Appeals of Arizona, Div. II.

Feb. 16, 1977.

County brought action for permanent injunction commanding insurance company and individual to remove barricade or fence from avenue which county claimed was a duly declared and established county road. The Superior Court, Cochise County, Cause No. 30045, Ruskin Lines, J., entered judgment in favor of defendants, and county appealed. The Court of Appeals, No. 2 CA-CIV 2197, Richmond, J., held that: (1) trial on merits was held, despite claim that proceeding was hearing on motion for summary judgment; (2) where attempted establishment of road was defective under the then applicable law, subsequent curative statute could not divest private owners and their predecessors in interest of the property.

Affirmed.

1. Judgment ⇐183

Where letter to attorney for litigants clearly stated that record would show that case was set for trial on certain date, minute entry stated that case came on regularly for trial and recited that counsel announced ready to proceed, reporter's transcript supported minute entry in that regard, county presented a witness, a practice inconsistent with a motion for summary judgment, and where county had notice of

trial setting, failed to exercise its right to request an advisory jury, and participated in the trial without objection, trial on merits was held, despite plaintiff county's claim that proceeding was a hearing on a motion for summary judgment.

2. Highways ⇐56

Where attempted establishment of road was defective under the then applicable state law, subsequent curative statute could not divest private owners and their predecessors in interest of the property. A.R.S. §§ 18–152, 18–152[A], Laws 1927, 4th Sp.Sess., c. 2, subch. 1, § 3; 43 U.S.C.A.

3. Public Lands ⇐64

Section of act of Congress declaring that right-of-way be granted for construction of highways over public lands not reserved for public uses would not be construed to grant rights-of-way and establish highways contrary to laws of state or territory in which lands affected were located. 43 U.S.C.A. § 932.

4. Public Lands ⇐64

In order for there to be a public highway, the right-of-way for which is granted by federal act declaring that a right-of-way be granted for the construction of highways over public lands not reserved for public uses, highway must be established in strict compliance with provisions of the Arizona law. A.R.S. §§ 18–152, 18–152[A], Laws 1927, 4th Sp.Sess., c. 2, subch. 1, § 3; 43 U.S.C.A. § 932.

5. Statutes ⇐265

Although curative statutes are necessarily retrospective in nature, such statutes may not impair vested rights.

6. Highways ⇐56

Where county failed to take steps necessary to comply with state law regarding the establishment of highways in 1911 over federal lands, and where the land was patented in 1916 without reservation of roadway, 1927 curative statute did not cure defect so as to establish the roadway over the former federal land. A.R.S. §§ 18–152, 18–152[A], Laws 1927, 4th Sp.Sess., c. 2, subch. 1, § 3; 43 U.S.C.A. § 932.

Beverly H. Jenney, Cochise County Atty., Richard J. Riley, Former Cochise County Atty., Bisbee, for appellant.

Gentry, McNulty, Borowiec, Hewlett & Desens by Matthew W. Borowiec, Bisbee, for appellees.

OPINION

RICHMOND, Judge.

The County of Cochise instituted an action for a permanent injunction commanding appellees to remove a barricade or fence from Garden Avenue, which is located in the vicinity of Sierra Vista. The county claims that Garden Avenue is a duly declared and established county road. On March 8, 1974, a show cause hearing was held, but the court deferred ruling until additional witnesses could be heard. In July, 1974, appellees filed a motion for summary judgment. By letter dated October 8, 1975, counsel were advised that the case was set for trial on February 4, 1976. At trial, exhibits and depositions were received in evidence and the county called one witness. The court subsequently entered judgment in favor of appellees, and this appeal followed.

In 1911, J. S. McNeish, then the Cochise County surveyor, submitted to the board of supervisors a map purporting to show the location of county roads from Don Luis to the Huachuca Mountains by way of Hereford. The map was approved by the board of supervisors and placed on file in the county recorder's office. It is not clear whether the original or a copy was recorded in Book # 1 of Maps, but another map was labeled Map No. 110. The former, however, depicts a road located within the Fort Huachuca Military Reservation while the latter reveals a road running outside the fort's boundary. The area presently in question was designated sections 10 and 11, and at the time of the recording was owned by the United States of America.

In 1915, a patent covering the subject real property was issued by the United

States to the Santa Fe Pacific Railroad Company, appellees' predecessor in interest.[1] Since that time, title has remained continuously in the hands of private interests. In August or September of 1971, Cochise County graded a portion of appellees' real property (which the county claims was the original roadway, although no longer used) and cut a road parallel to the Fort Huachuca boundary. In January or February of 1974, appellee Lloyd Fuller placed fences across the road on the northern boundary of section 10 and the southern boundary of section 11.

[1] Cochise County has raised two questions for our review. We believe that neither has merit and therefore affirm. The county's initial contention is that appellees were not entitled to summary judgment, and no trial on the merits has been held. The county claims that the proceeding of February 4, 1976, was a hearing on the motion for summary judgment, and attempts to bolster its position by arguing that there was neither notice of trial, pretrial conference, opportunity to request an advisory jury, nor consolidation of the hearing on the motion with a trial on the merits.

The letter of October 8, 1975, to the attorneys for the parties clearly stated:

> "Let the record further show that the case of *Cochise County vs. Pioneer Title Ins.* is also set for trial before the Court at 10:00 A.M. on Wednesday, February 4, 1976."

The minute entry of February 4, 1976, states that the cause ". . . came on regularly this date for trial," and also reflects that "Counsel announced ready to proceed." The reporter's transcript supports the minute entry in the latter regard. The county presented a witness, a practice inconsistent with a motion for summary judgment. The county had notice of the trial setting, failed to exercise its right to request an advisory jury, and participated in the trial without objection.[2]

Cochise County's second contention is that the trial court's findings were erroneous, as the requirements of A.R.S. § 18–152 (repealed Laws 1973) had been met and the road was a public highway. The county argues that there was an attempt to establish a highway outside Fort Huachuca in 1911, and that it was used for two years prior to 1927 in compliance with § 18–152.[3] Appellees, on the other hand, contend that a curative statute cannot correct defects in an attempted establishment of a road after the land in question has come into private ownership by virtue of a federal patent.

[2] The trial court found as a fact that there was only one road in the vicinity of the Fort Huachuca boundary, and that it was located primarily within the fort. The court concluded that the attempted establishment of the road was defective under the then applicable law, Paragraph 3972 of the Civil Code of 1901, and that a subsequent curative statute could not divest appellees and their predecessors in interest of the property. We agree.

1. Pioneer National Title Insurance Company, as Trustee under Trust No. 218413, is the record title owner of the real property, and Pioneer National Title Insurance Company, as Trustee under Trust No. 10662, is the equitable owner by virtue of a contract for sale between the trusts, in which Trust No. 10662 is the purchaser. Appellee Lloyd Fuller is one of the beneficiaries under Trust No. 218413, and the sole beneficiary under the purchasing trust, No. 10662.

2. The judgment also refers to the February 4 proceeding as a trial.

3. A.R.S. § 18–152(A) (repealed Laws 1973) provided:

> "A. All highways constructed, laid out, opened or established prior to August 12, 1927 as public highways by the territory or state, or by a board of supervisors or legal subdivision of the state, and which have been used continuously by the public as thoroughfares for free travel and passage for two years or more, regardless of any error, defect or omission in the proceeding to establish the highways, or in recording of the proceedings, and all highways established pursuant to law, are declared public highways sixty-six feet wide, unless the width thereof is otherwise specified."

[3] The act of Congress of 1866, section 2477, Rev.St., now known as 43 U.S.C. § 932, declared that a right-of-way be granted for the construction of highways over public lands not reserved for public uses. This section, however, will not be construed to grant rights-of-way and establish highways contrary to the laws of the state or territory in which the lands affected are located. *Tucson Con. Copper Co. v. Reese*, 12 Ariz. 226, 100 P. 777 (1909); *State v. Crawford*, 7 Ariz.App. 551, 441 P.2d 586 (1968).

In the present case, whether the road in question was actually within or without the Fort Huachuca boundary, it is evident that it lay on federal land. The distinction is that a road within Fort Huachuca lies on federal property reserved for public uses and therefore falls outside the scope of R.S. § 2477. The trial court did not base its decision on this distinction, however. Rather, it looked to the law in Arizona at the time of the alleged establishment of the road to see if there had been compliance with the applicable laws.

[4] Paragraph 3972 of the Civil Code of 1901 provided, inter alia, that the board of supervisors might lay out or change a public road on the petition of ten or more resident taxpayers within the county. It further provided that after the preliminary steps had been taken as required, the board of supervisors must have declared the location to be a public highway and caused notice of such action to be served upon the road overseer of the district in which the road was located. In order for there to be a public highway, the right-of-way for which is granted by the federal act, the highway must be established in strict compliance with the provisions of the Arizona law. *State v. Crawford*, supra. See also, *State ex rel. Herman v. Cardon*, 112 Ariz. 548, 544 P.2d 657 (1976).

[5, 6] Cochise County concedes that the board of supervisors failed to take those steps necessary to comply fully with Arizona law regarding the establishment of highways in 1911, yet claims that any defect was corrected in 1927 by the enactment of A.R.S. § 18–152 (repealed Laws 1973). This contention ignores the fact that the subject real property was transferred to private ownership by virtue of a 1915 patent, which has been described as the highest evidence of title. *State v. Crawford*, supra. Although curative statutes are necessarily retrospective in nature, it is well settled that such a statute may not impair vested rights. *Orme v. Salt River Valley Etc. Assn.*, 25 Ariz. 324, 217 P. 935 (1923); *Davis v. Union Pacific Railway Company*, 206 Kan. 40, 476 P.2d 635 (1970); *Addison v. Fleenor*, 65 Wyo. 119, 196 P.2d 991 (1948). It is our opinion that Cochise County failed to properly establish a roadway in 1911, and that § 18–152 could not cure any defect in the establishment proceedings, because intervening rights had vested by virtue of the federal patent granted in 1915. Title passed at that time to appellees' predecessors in interest without reservation of any roadway because none had been legally established under Arizona law. Thereafter there was nothing left to cure.

The judgment is affirmed.

HOWARD, C. J., and HATHAWAY, J., concur.